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Juno SRL v. S/V Endeavour, CA1, 58 F.3d 1, 6/9/95

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Jones Act Seamen

FLEET DOCTRINE APPLIES TO SHORE-BASED RIGGER WORKING ON BARGE

Asserting the fleet doctine, where permanent assignment to group of vessels under common ownership can be shown, allows a rigger working on floating platforms to acquire seaman status in a Jones Act action.

(Gizoni v. Southwest Marine Inc., CA9, 56 F.3d 1138, 6/7/95)

Byron Gizoni (Gizoni), shore-based rigger and rigging foreman, was injured when he stepped into a hole on the deck of Southwest Marine Inc.'s (Southwest's) floating pontoon barge or floating platform during repair of a U.S. Navy ship. The pontoon was secured to a floating dry dock being used to repair the ship's rudder.

Southwest, Gizoni's employer, was sued under the Jones Act, 46 U.S.C. app. § 688, on the claim that Gizoni was a seaman because of his work aboard the barges and watercraft owned by Southwest Marine. Although the Jones Act provides an injured seaman a cause of action in negligence, it does not define seaman for purposes of the Act.

The district court found Gizoni to be a harbor worker and therefore precluded from suing under the Act, granting Southwest summary judgment. The court of appeals reversed. The appeals court found that the lower court had erred in its instructions to the jury on the definition of "seaman." In its remand for a new trial, the appeals court held: (1) that the fleet doctrine instruction should have been given; (2) evidence that Gizoni had been employed on a vessel in navigation was not misleading; (3) the court's instruction defining a vessel was erroneous; but that (4) the "permanent connection" instruction was correct.

Gizoni, the ninth circuit noted, had to show, by a preponderance of the evidence, that he was a "seaman." According to the *Bullis* test, to prove one is a seaman, he must be (1) employed on a vessel that is in navigation; (2) permanently connected to that vessel; and (3) contributing to the function of the mission of the vessel. *Bullis* v. *Twentieth Century-Fox Film Corp.*, 474 F.2d 392, 393 (9th Cir. 1973).

Gizoni claimed that the district court had erred by not instructing the jury on the fleet sea doctrine. The fleet doctrine, created by the fifth circuit to lower the requirement that a seaman had to be permanently assigned to a vessel, allows one to acquire seaman status through permanent assignment among multiple vessels under one common ownership. *Campo* v. *Electro-Coal Transfer Corp.*, 970 F.2d 51, 52 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1261, 122 L.Ed.2d 659 (1993). The appellate court determined that the fleet doctrine was a reasonable extension of Jones Act precedent. The court considered evidence that Gizoni had worked on a variety of barges for Southwest. The fleet doctrine was also applicable, ironically, because Southwest, in its closing argument, focussed on the fact that Gizoni could not prove that he was "more or less permanently attached" to a particular barge. Therefore, the district court clearly erred in not giving the instruction.

The district court, argued Gizoni, also erred by instructing the jury that Gizoni had to prove that the situs of the accident occurred on a vessel in navigation. Under the Jones Act, a seaman may recover for any injury that occurred in the course of employment. *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 63 S.Ct. 488, 87 L.Ed. 596 (1943). Thus, whether or not the injury occurred on a vessel is irrelevant. Yet, in contrast, the judge's instruction to the jury implied Gizoni had to establish that he was employed on a vessel in navigation to recover.

Further, said Gizoni, the district court *clearly erred* in instructing the jury with the following: "If the transportation function, if any, of the floating platform was merely incidental to its other functions, the floating platform cannot be found to be a vessel. * * * [T]o be a vessel, the purpose of the floating platform must, to some reasonable degree, be the transportation of passengers, cargo or equipment from place to place across navigable waters." *Gizoni* v. *Southwest Marine Corp.*, 56 F.3d 1138, 1142 (9th Cir. 1995).

The court of appeals stated in previous decisions that unusual-looking craft, whose purpose is not the transportation of persons or things, can be considered vessels under the Jones Act. *Estate of Wenzel* v. *Seaward Marine Services*, 709 F.2d 1326 (9th Cir. 1983). Hence, the district court's instruction regarding the transportation function was also erroneous.

Finally, the plaintiff contended that, when the district judge instructed the jury, "[Gizoni] had to establish that he had a more or less permanent connection with the vessel * * *[,]" that this implied that he was required to spend most of his time on that particular barge. The appeals court did not find this statement misleading. According to the United States Supreme Court, "the key to seaman status is employment-related connection to a vessel in navigation." *McDermott Int'l* v. *Wilander*, 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991).

The purpose of the connection requirement is not intended to allow an individual who works for an isolated period protection under the Jones Act, but to protect the seaman who serves aboard one particular vessel for a brief time. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 6-9, at 263 (2d ed. 1994).

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Collision

IYRR YACHTING REGULATIONS PREEMPT COLREGS

In yacht collision case, findings of International Jury preempt U.S. court's application of Articles 12 & 13 of the Convention on International Regulation for the Prevention of Collisions at Sea (COLREGS).

(Juno SRL v. S/V Endeavour, CA1, 58 F.3d 1, 6/9/95)

On October 3, 1992, two vessels, the *Charles Jourdan* and the *Endeavour*, were racing in the La Nioulargue Regatta in and around the Bay of St. Tropez. Although the yachts were racing on separate courses, the

courses converged near the entrance to St. Tropez Bay at a mark designated as "A." As it approached mark "A," the *Charles Jourdan* was sailing to leeward and believed it had the right of way pursuant to International Yacht Racing Rule (IYRR) 37.1: "[A] windward yacht shall keep clear of a leeward yacht." The crew of the *Endeavour* failed to make an attempt to change course to windward until the last minute and as a result the boom of the *Endeavour* struck the backstay of the smaller *Charles Jourdan*, causing substantial damage.

An International Jury was convened, as per the IYRR, to determine fault for the collision. The International Jury, applying the rules agreed to by the participants in the race, found the *Endeavour* at fault.

In September 1993, the owner of the *Charles Jourdan* filed an action in admiralty, seeking compensation for the damage sustained, and had the *Endeavour* arrested. The *Endeavour*'s owners denied liability and counterclaimed for losses due to alleged false arrest of the vessel. The district court held that Articles 12 and 13 of the Convention on International Regulation of Collisions at Sea (COLREGS), 33 U.S.C. § 1600 et seq., 33 C.F.R. § 80.01 et seq., preempted application of the rules of a private yacht racing organization.

The district court ignored the findings of the International Jury and concluded, under COLREGS Rule 13, 33 U.S.C. foll. § 1602, that the *Charles Jourdan* was an overtaking vessel required to keep clear of the *Endeavour*. Pursuant to the "Pennsylvania Rule," *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1873), failure to abide by navigation rules creates a presumption of negligence. Accordingly, the *Charles Jourdan* was presumed to be at fault. The *Endeavour*'s failure to take action to avoid the collision was found to be significant and was apportioned 40% of fault. The court determined that the physical damage to the *Charles Jourdan* was valued at $10,000, which was reduced to $4,000.

The first circuit, although noting that the COLREGS were historically meant to be the "international rules of the road for maritime traffic," 58 F.3d at 4, also stated: "[N]othing in their history, or in the public policy issues that led to their enactment, indicates that they were meant to regulate voluntary private sports activity in which the participants have waived their application and in which no interference with nonparticipating maritime traffic is implicated." *Id.* The court based its conclusion not only on the nature of the COLREGS and the private activity involved, but also on the "strong public policy in favor of the private settlement of disputes." 58 F.3d at 5. The court traced through a number of venerable English decisions the premise that "when one voluntarily enters a yacht race for which published sailing instructions set out the conditions of participation, a private contract results between the participants." *Id.* Such a contract established the conditions under which the participants agreed to be bound. "The parties agreed to the substantive rules for determining fault, they agreed to the adjudicating forum, and they were apprised of the procedures. They appeared before [the International Jury], submitted to its jurisdiction, presented evidence and argument, and thereafter were served with that body's findings and final decision." 58 F.3d at 6.

The appeals court also took note of federal policy favoring arbitration under § 2 of the Federal Arbitration Act, which specifically defines "collisions" as arbitrable "maritime transactions." The two yachts had agreed to be contractually bound by the rules of the road as set forth in the IYRR. The court, finding that the IYRR procedures adequately addressed due process concerns, reversed the district court, commenting "It is hard to find fault with such a process, particularly when it is exactly what the participants agreed to." 58 F.3d at 7.

The first circuit, however, agreed with the district court that it had valid jurisdiction over the damages issue, stating that courts were the rightful forum for the litigation of damages, unless yacht racing authorities provided for private means of resolution. The court of appeals affirmed the district court's finding that there were $10,000 in damages resultant from the collision. However, the first circuit held that it was error for the lower court to have mitigated the damages by assessing the *Charles Jourdan* for comparative fault, since the International Jury had preemptively found the *Endeavour* responsible for the collision, thereupon reinstating the full $10,000 award to the *Charles Jourdan*.

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Maritime Cargo

SUBSTITUTE VESSEL IS NOT A COGSA UNREASONABLE DEVIATION UNDER TERMS OF BILL OF LADING

A carrier's restowage of cargo onto a vessel different from that originally named in a contract of carriage is not an "unreasonable deviation" from the contract if a provision allows for vessel substitution "to perform all or part of the carriage."

(Yang Machine Tool Co. v. Sea-Land Service, Inc., CA9, 58 F.3d 1350, 6/30/95)

The Yang Machine Tool Company (Yang Machine) contracted with Sea-Land Service, Inc. (Sea-Land) to transport a large horizontal machining center from China to California. Since the cargo was too large to fit inside a standard 40-foot enclosed container, it was secured by steel bands in two parts on open "flat racks," metal pallets without side walls or tops, and placed on board the *Merchant Prince*. The *Merchant Prince* carried the cargo from China to Yokohama, Japan, where it was offloaded onto the *Sealand Patriot* for completion of the carriage to California. During loading onto the *Sealand Patriot*, a hoisting cable broke, resulting in damage to the cargo.

The bill of lading identified the *Merchant Prince* as the carrying vessel. Nothing in the bill indicated that the cargo would be restowed aboard the *Sealand Patriot*. The bill contained a